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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL CHARLES RIZER, Defendant and Appellant.	G039026 (Super. Ct. No. 04W1401) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lynne McGinnis and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant appeals his conviction for the murder of his mother. He argues that the police wrongfully continued questioning him after he requested an attorney, and further claims that he should have a new sanity hearing. Finally, he claims instructional error. We find defendant's arguments to be without merit and affirm.

I

FACTS

As of May 2004, the 23-year-old defendant lived with his mother and father, Ann and Joseph Rizer.[1] Defendant's parents had become concerned about his behavior at the beginning of May, because defendant was not eating or sleeping much and was spending a great deal of time playing a videogame Ann and Joseph planned to take their son to see a psychiatrist.

Although Joseph described the relationship between defendant and his mother as "wonderful," he admitted that they fought and yelled at each other regularly. On the evening of May 16, defendant and his parents had an argument about defendant's lack of car insurance, which ended with his parents taking away his car keys.

Joseph kept numerous weapons in the house, including a shotgun, and a .380-caliber pistol that he kept under his mattress. Joseph gave Ann and defendant "some instruction" in their use. On May 17, most of the weapons had been placed in the master bedroom for cleaning.

On May 17, Joseph was home for lunch and defendant appeared to be behaving normally. Joseph returned to work. In the afternoon, Joseph received a call from Ann stating that all the doors in the house were locked. Neither were sure if they had a key.

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[1] Due to their common surname, we refer to Ann and Joseph Rizer by their first names to avoid confusion. No disrespect is intended. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475-476, fn. 1.)

When Joseph arrived at home, he saw Ann's purse and called for her, but she did not answer. He went to the master bedroom, and when he touched the door, it opened. He saw defendant hiding behind a bedpost pointing a shotgun at him. Joseph asked defendant what he was doing, and defendant responded, "She had a key, she wasn't supposed to have a key." Joseph asked him what he meant, and defendant pointed toward the bathroom. Ann was lying on the bathroom floor. Defendant was holding a small bunch of hair, which he said his mother had pulled out of his head during a struggle and that his mother had attacked him. Joseph knew from the amount of blood that Ann was dead.

When the police arrived, Ann was dead. It was determined that she died from a gunshot wound to her right eye, fired from close range. The police found numerous other guns in the bedroom and living room. Ann was holding a key ring with a key that opened the master bedroom door.

Defendant's statements to the police were confused and disjointed. On the way to the police station, he opined on matters ranging from the Declaration of Independence to contemporary politics to Confucian philosophy. At the police station, he was read his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). When speaking about his mother, he said that something that day had been "really wrong with her" because she had been calling all day, wondering what was going on with defendant. He did not want to speak with her because it was "weird" that she was calling and calling. He stated his reaction was "to defend myself." When his mother came home, defendant said, she was looking for him. He heard her on the phone lying to his father, because she did have a key to the bedroom. "So, when she walked into the bedroom, she reached for the mattress and I was hiding in the closet, and, she was looking[] around the room for me, and, I saw the gun in her hand, I cocked the shotgun and I fired it, because she was pointing it at me. . . ."

Later in the interview and during subsequent interviews, defendant continued to provide confusing and often conflicting statements. Among them, defendant claimed his mother had tried to kill herself on the previous day, and killed her so that his father would not have to face his mother's suicide. He also said he had a plan to ambush his mother since Mother's Day. Defendant told the police that after he shot his mother, he took a lock of her hair so that he could use the DNA to bring her back to life. This conflicted with an earlier explanation of why he took the lock of hair, which was so that he could tie a yellow ribbon around it and give it to a family member.

During a subsequent interview on May 18, one of the detectives, Tim Vu, confronted defendant with his belief that his mother never had a gun in her hand, and she was not about to kill herself. Defendant, rather, had ambushed her. Vu asked defendant why, and he replied that "She wasn't supposed to have a key to that room." He stated that she went for the gun under the bed, but subsequently admitted no gun was there. When Vu started to ask another question, defendant stated "I want to talk to my lawyer before I continue any of this." Vu replied, "Okay." Defendant asked, "Is there something we can work out here?"

Vu then responded, in relevant part: "My . . . mission here, and it's up to you, you certainly have the opportunity to talk to a lawyer. You can end this conversation any time you want. My mission is — simply is to gather the facts and report accordingly to the D.A.'s office. I've already explained to you what we know. If you want to put out on the record and get it straight so that way you're not looked at as basically lying your way through this whole thing, it's up to you to come clean. But you can choose to not talk to us and assert your right to have an attorney. That's entirely up to you. But you wanted to be basically on the record, correct, and that information that you're putting out is in — is correct in that you don't want to come across as a liar. It's up to you. I'd like to know the truth. . . . I understand she's not supposed to have a key

for the room. . . . She was supposed to stay outside, wait for your dad to come home, sit on the couch, watch TV, okay?"

Defendant: "Fine. . . . I'm psychic. Is that what you want to hear?"

Vu: "No, I want to know the truth."

Defendant: "That's exactly what it is.

Vu: "Why —"

Defendant: "I anticipated her every move."

Vu: "Why did you fire on your mom when she wasn't armed with a handgun?"

Defendant: "Because when she saw me, she got scared . . . that I knew what she was about to do and that scared her. . . ."

From that point, defendant continued to answer questions, admitting that his mother never had a gun. He then claimed the gun went off accidentally before finally admitting "However you look at it, it's a murder." Defendant said that after his mother came into the room, they had "a very bad conversation" and then accidentally shot her. He continued to state that his mother had planned to commit suicide, but also stated that he knew what he did was wrong. "The bottom line is everything I did was wrong, and I fully understand the entirety of what I did. And I am prepared to accept whatever judgment you want to give me."

Defendant was charged with murder (Pen. Code, § 187, subd. (a))[2] and it was further alleged that defendant had personally discharged a firearm, causing death (§ 12022.53, subd. (d)). Defendant pled not guilty by reason of insanity. At the conclusion of trial, the jury found defendant guilty of first degree murder and found the firearm enhancement true.

[2] Subsequent statutory references are to the Penal Code.

During the sanity phase, the jury heard testimony of defendant's history of alcohol and marijuana use. A friend testified that he was concerned about defendant's mental state, and that he would often be very talkative and make nonsensical statements

Psychiatrist James Missett testified that defendant suffered from schizoaffective disorder and was schizophrenic and psychotic when he shot his mother. He believed that defendant had been showing symptoms in the two weeks prior, but defendant's condition had developed when he was in college. He self-medicated with drugs and alcohol. He based his opinion and defendant's statements, behavior, symptoms, and statements to the police. Missett believed that due to defendant's severe mental illness, he was unable to distinguish between right and wrong when he shot his mother. He believed his delusion that she was going to kill him.

During cross-examination, Missett discussed his report, which stated that defendant's recent drug abuse could have contributed to his psychosis at the time he killed his mother. He was aware that two court-appointed doctors had concluded that defendant was legally sane at the time of the killing.

Psychologist Veronica Thomas also testified that defendant was a paranoid schizophrenic at the time he shot his mother. She testified that defendant showed signs consistent with the onset of the disease in college. She believed that defendant's writings and bizarre behavior showed he was delusional at the time of the crime, and his delusions kept him from understanding the nature of his act and distinguishing right from wrong. On cross-examination, Thomas agreed that there was a difference between mental illness and legal insanity. She also admitted that defendant was manipulative, and characterized him as a habitual liar.

Psychologist Roberto Flores de Apodaca was appointed by the court and testified for the prosecution. He reviewed documents relating to the case, conducted testing, and interviewed defendant for approximately four hours. He characterized defendant not as schizophrenic, but as suffering from a nonspecified personality disorder

and substance dependence. It was his opinion that defendant was psychotic but not legally insane at the time of the crime.

The jury subsequently found defendant sane at the time of the murder. Defendant moved, without opposition, to reduce the murder conviction from first degree to second degree. He was sentenced to 40 years to life in state prison, consisting of a term of 15 years to life for the murder plus a consecutive sentence of 25 years to life for the firearm enhancement.

II

DISCUSSION

Miranda

Defendant claims the police violated the precepts of *Miranda, supra,* 384 U.S. 436, by continuing with an interview after he requested an attorney. Respondent argues that because defendant reinitiated the interview, no *Miranda* violation occurred. The trial court agreed with respondent and denied defendant's motion to suppress pursuant to section 1538.5.

"An appellate court applies the independent or de novo standard of review, which by its nature is nondeferential, to a trial court's granting or denial of a motion to suppress a statement under *Miranda* insofar as the trial court's underlying decision entails a measurement of the facts against the law. [Citations.] As for each of the subordinate determinations, it employs the test appropriate thereto. That is to say, it examines independently the resolution of a pure question of law; it scrutinizes for substantial evidence the resolution of a pure question of fact; it examines independently the resolution of a mixed question of law and fact that is predominantly legal; and it scrutinizes for substantial evidence the resolution of a mixed question of law and fact that is predominantly factual. [Citation.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 730.)

The only issue here is whether the police should have stopped questioning defendant after he requested an attorney. As set forth in the statement of facts, during

questioning, defendant stated "I want to talk to my lawyer before I continue any of this." Vu replied, "Okay." Defendant asked, "Is there something we can work out here?" Vu then replied with a rather long colloquy (set forth in full *ante*), and at its conclusion, defendant continued answering questions.

Generally speaking, a request for an attorney is sufficient to require that questioning cease. (See, e.g., *People v. Soto* (1984) 157 Cal.App.3d 694, 705.) If, however, a "suspect personally 'initiates further communication, exchanges, or conversations' with the authorities" the police are not required to end the interrogation. (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.) A defendant initiates such communication, in this context, by actions that can "be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation." (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045 (*Bradshaw*).)

In *Bradshaw*, the defendant requested an attorney during interrogation, and the officer stopped questioning him. (*Bradshaw, supra,* 462 U.S. at pp. 1041-1042.) Sometime later, the defendant asked an officer, "'Well, what is going to happen to me now?'" The officer responded that the defendant, having requested an attorney, did not have to speak to him. The defendant said he understood, and his subsequent actions resulted in statements later used against him. (*Id.* at p. 1042.) The Supreme Court, finding that the defendant had chosen to initiate further discussions about the case with the authorities, did not have his rights under *Miranda* violated. (*Id.* at pp. 1044-1046.) "Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation." (*Id.* at pp. 1045-1046.)

In this case, defendant had been previously advised of his *Miranda* rights, and waived them. During interrogation, defendant invoked his right to counsel: "I want to talk to my lawyer before I continue any of this." Vu replied, "Okay." Defendant asked, "Is there something we can work out here?" Vu responded by stating, in sum, that defendant had the right to end the interrogation and speak to a lawyer. He also stated that defendant might not want to look like a liar. At the end of Vu's statement (set forth in full *ante*), defendant continued answering questions.

We find that defendant's behavior here is not dissimilar to the situation in *Bradshaw*. Defendant's request for an attorney was followed by the detective's reminder that he did not have to continue interrogation. Defendant then continued speaking with the police. Given the context, we find that defendant voluntarily initiated further conversation, and therefore, no violation of *Miranda* occurred.

Even if we were to find that defendant's statements were improperly admitted, there was no prejudice as a result. The improper admission of a statement subject to *Miranda* is reversible error unless harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) There was overwhelming evidence of the defendant's guilt. Although he contends otherwise, defendant had already admitted, prior to requesting counsel, that he knew his mother did not have a gun in the bedroom. Even if his later statements regarding his commission of "murder" were excluded, there was more than ample evidence from which the jury could find either express or implied malice sufficient to support a murder conviction. Thus, any error was harmless.

Substantial Evidence to Support Sanity Finding

Defendant claims that he is entitled to a new sanity hearing because a preponderance of the evidence showed that he was having delusions at the time of the crime. Defendant apparently believes that if he produced evidence at trial that would be

sufficient to *uphold* a finding of insanity on appeal, we are automatically required to find there was not substantial evidence to support a contrary finding.

Such is not the case. If a jury finds the defendant was not insane, the proper standard of review is substantial evidence. "'[O]ur inquiry on this just as on other factual issues is necessarily limited at the appellate level to a determination whether there is substantial evidence in the record to support the jury's verdict of sanity . . . .'" (*People v. Drew* (1978) 22 Cal.3d 333, 350, overruled on other grounds in *People v. Skinner* (1985) 39 Cal.3d 765, 769.) Evidence is substantial when it is of ponderable legal significance, reasonable in nature, credible, and of solid value. (*People v. Ramsey* (1988) 203 Cal.App.3d 671, 682.)

Section 25, subdivision (b), establishes the criteria for legal insanity in California. "[T]his defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (See *People v. Ferris* (2005) 130 Cal.App.4th 773, 780.)

As discussed above, the jury heard from three experts, two of whom concluded that defendant was legally insane at the time of the crime, and one who did not. We may not, in a review for substantial evidence, weigh or balance the testimony of the experts. Nor may we second-guess whether, based upon the evidence of defendant's bizarre statements and conduct, we would have reached one conclusion or another.

Our task is simply to decide whether de Apodaca's testimony supplied substantial evidence that defendant was not insane at the time he shot his mother. De Apodaca testified that defendant had a polysubstance dependence disorder[3] and an unspecified personality disorder with borderline and narcissistic features. Defendant

[3] De Apodaca explained this meant that defendant used number of different classes of drugs.

admitted to de Apodaca, during their interview, that his claim of self-defense was untrue, invented to "lie my way out of a sticky situation."

De Apodaca explained his diagnosis in detail to his jury, describing both the features of the substance dependence disorder and the personality disorder. He described a personality disorder as potentially a "major mental illness" and at a minimum, "very significant." De Apodaca testified that he had reviewed the findings of the other expert witnesses, and explained why he disagreed with them. Specifically, he felt that defendant's history was inconsistent with a diagnosis of schizophrenia. De Apodaca testified that based on his evaluation, he believed defendant was not legally insane at the time of the crime.

Once we put aside, as we must, defendant's attempts to finesse and cajole the record into his desired meaning, it becomes clear that de Apodaca's testimony is more than sufficient for the jury to find that defendant was not legally insane at the time of the crime. Because the evidence more than meets the substantial evidence threshold, defendant is not entitled to a new insanity hearing.

CALCRIM No. 3450

Defendant claims CALCRIM No. 3450 (2006), is unconstitutional because it does not "explain that the jury should find [him] insane if he knew his act was illegal and would be punished for it *and yet* he was incapable of distinguishing what was morally right from what was morally wrong."

"It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.] '[T]he fact that the necessary elements of a jury charge are to be found in two instructions rather than in one instruction does not, in itself, make the charge prejudicial.' [Citation.] 'The absence of an essential element in one instruction may be supplied by another or cured in light of the

instructions as a whole.' [Citation.]" (*People v. Burgener* (1986) 41 Cal.3d 505, 538-539, overruled on another point in *People v. Reyes* (1998) 19 Cal.4th 743.) We assume that jurors are intelligent persons who are capable of understanding and correlating all jury instructions that are given. (*People v. Mills* (1991) 1 Cal.App.4th 898, 918.)

The trial court, as requested by defendant, instructed the jury, in relevant part: "The defendant was legally insane if, number one, when he committed the crime he had a mental disease or defect; and, number two, because of that disease or defect he did not know or understand the nature and quality of his act, or did not know or understand that his act was morally or legally wrong." The court also instructed the jury: "The word wrong in the sanity context means the violation of generally accepted standards of moral obligations. In that context, a defendant is sane if he knows his act violates generally accepted standards of moral obligation and not those standards peculiar to the defendant. Thus, a finding of insanity requires that the defendant acted on a sincerely held belief grounded in generally accepted or moral principles."

Despite respondent's claim to the contrary, we find no forfeiture, because we review defendant's challenge under section 1259 as to whether the alleged instructional error affected his substantial rights. The instruction, however, was constitutional.

As discussed *ante*, section 25, subdivision (b), is the relevant statute for defining insanity. "[T]his defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." In *People v. Skinner, supra*, 39 Cal.3d at page 783, the court explained that "wrong" refers to both legal and moral wrong.

Language which "which essentially tracks the language of section 25, subdivision (b), 'correctly and adequately explain[s] the applicable law to the jury.'"

(*People v. Jablonski* (2006) 37 Cal.4th 774, 831.)[4] The jury in this case was instructed that defendant was legally insane if "because of [a mental] disease or defect he did not know or understand the nature and quality of his act, or did not know or understand that his act was morally or legally wrong." We find this language sufficiently explains that if defendant did not understand his act was morally wrong — including any lack of comprehension as to the difference between morally right and wrong acts — defendant would then meet the definition of insanity.

Because the language of the instruction properly tracked the statute and correctly explained the law, the trial court did not commit instructional error.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.

[4] Defendant's citation of *People v. Thomas* (2007) 156 Cal.App.4th 304, is misplaced. In that case, the court addressed an entirely different part of CALCRIM 3450, one which has no application here.